COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 05-CI-459

COMMONWEALTH OF KENTUCKY,
OFFICE OF ATTORNEY GENERAL
Ex Rel. Gregory D. Stumbo, in his official

capacity **PLAINTIFF**

v.

BOARD OF DIRECTORS FOR THE
COMMONWEALTH POSTSECONDARY
EDUCATION PREPAID TUITION TRUST
FUND, et al **DEFENDANTS**

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Amicus Curiae Brief on Behalf of Russell Barnett and David M. Ward

INTRODUCTION

The purpose of this brief is to provide the Court with the perspective of parents who have invested in the Kentucky Affordable Prepaid Tuition (KAPT) in order to provide for their children's college education. Because no parents or children who will be directly affected by the outcome of this case are formal parties to this action, the petitioners Barnett and Ward believe it will be helpful to the Court to better understand the issues raised in this case from the perspective of KAPT parents and children. Petitioners do not intend to re-visit the arguments made by the parties to this action, but rather wish to provide for the Court an understanding of the severe and adverse impact that the provisions of the 2004 Budget Bill will have on the legitimate investment backed expectations of the participants in the KAPT program.

ARGUMENT

KAPT PARENTS AND CHILDREN HAVE BOTH CONTRACT AND PROPERTY RIGHTS AS A RESULT OF THEIR INVESTMENTS IN THE KAPT FUN. THE 2004 BUDGET BILL IMPAIRS THE STATE'S OBLIGATIONS UNDER THE KAPT CONTRACT AND RESULTS IN A TAKING OF THE PRIVATE PROPERTY THAT KAPT PARENTS HAVE INVESTED.

KAPT parents have invested their own funds in this program to secure a college education for their children. There can be no question that the funds that are the source of the initial investment are wholly private funds, made by families like the Barnetts and the Wards, for one of the most important financial investments most families make: the education of their children. KAPT investors have constitutionally protected rights at stake in the KAPT funds, as a matter of both contract law and property law. The U.S. Supreme Court has explained how courts should evaluate the question of whether a private property interest exists in a public program:

> To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not arbitrarily be undermined.
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> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law---rules or understanding that secure certain benefits that support claims of entitlement to those benefits.
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> *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972).

The statutory commitment made by the Commonwealth of Kentucky in enactment of KRS 164A.701 to 164A.704 is exactly the kind of "rules or understanding that secure certain benefits that support claims of entitled to those benefits" that the U.S. Supreme

Court has held, must "not arbitrarily be undermined." in *Roth.* Parents who have invested private funds to secure educational benefits for their children, under a defined program that sets forth in state law the exact scope of the benefits, cannot be deprived of those property and contract rights through a suspension of the statutory requirements. Those are exactly the kind of "claims people rely upon in their daily lives" that "the ancient institution of property" protects.

By expropriating the $13.7 million in collateral that had been lawfully encumbered to secure the obligations owed by the Commonwealth of Kentucky to the KAPT investors, the legislature has impaired the contractual obligation of the state to the KAPT families in violation of Section 19 of the Kentucky Constitution, and has taken the property of the KAPT families, held in trust by the Commonwealth, "without just compensation being previously made" in violation of Section 13 of the Kentucky Constitution.

While the legislature may suspend statutes involving the expenditure of unencumbered public funds, the power of the legislature to suspend statutes is limited. When those funds are encumbered with statutory obligations to private citizens who have made financial investments in public programs in reliance on the promise of the state to provide a defined benefit, a legally enforceable trust is created. When public and private funds have been co-mingled, the legislature cannot transfer funds in a manner that impairs the public obligations to private investors. As the Kentucky Supreme Court has held, "transfer of money from agencies in which public funds and private employee contributions are commingled, and cannot be differentiated, is unconstitutional." *Commonwealth, ex rel. Armstrong v. Collins,* 709 S.W.2d 437, 446-47 (Ky. 1986).

The legislature's power to suspend statutes derives from its plenary authority over appropriations under Section 230 of the Kentucky Constitution. *See Armstrong v. Collins, Id.* at 441, *Legislative Research Commission v. Brown*, 664 S.W.2d 907, 925 (Ky. 1984) ("the final action on the enactment or adoption of a budget is a legislative matter."). The powers of the legislature over appropriations and revenue are indeed broad. But they are not unlimited. They are enumerated in Sections 29-62, and Section 230 of the Kentucky Constitution. The Kentucky Constitution also explicitly provides that rights enumerated in the Bill of Rights (Sections 1-26), such as the right against public taking of property without just compensation (Section 13) and the right against the state impairing the obligations of contracts (Section 19), take precedence over the rights of the legislative department of government. As stated in Section 26:

> To guard against the transgression of the high powers which we have delegated, We Declare that every thing in this Bill of Rights is excepted out of the general powers of government and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.
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> *Kentucky Constitution, Section 26.*

Moreover, the 2004 Budget Bill does more than adopt a budget and make appropriations for the operation of government. Instead, the 2004 Budget Bill has uniquely sought to amend substantive legislation, unrelated to the budget, by repealing KRS 393.015, which authorizes the use of abandoned property funds as collateral to secure the state's obligations under the KAPT program upon a showing of actuarial necessity. This misuse of the budget legislation to amend statutory law violates the clear provision of Section 51 of the Kentucky Constitution, which prohibits legislation relating to "more than one subject." This unilateral extinguishment of the primary source of collateral to secure the state's obligations under the KAPT contracts is utterly arbitrary and capricious. It unilaterally alters the basis for the bargain between the state and KAPT families, *ex post facto,* and thus it also impairs the obligations of the KAPT contracts in violation of Section 19 of the Kentucky Constitution.

Moreover, this Court must consider the arbitrary nature of the budget legislation that impairs the obligation of the KAPT contracts. *See* Kentucky Constitution, Section 2. KAPT families that have made very significant investments in this college tuition program, are left with few options. The state has unilaterally repudiated its contractual and statutory obligations. Yet the KAPT families have no meaningful remedy. If they withdraw from the KAPT program, they run the risk of obtaining only the principal amount invested (with the possibility of significant administrative fees), and any such withdrawal would further undermine the financial stability of the Fund. *See* KRS 164A.709 (providing for only discretionary, not mandatory, payment of interest upon voluntarily withdrawal prior to initial projected year of college enrollment). This is utterly unfair to the KAPT families that have made good faith investments based on the reasonable expectation that the state would honor its statutory and contractual commitments.

Conclusion

For the reasons stated above, this Court should sustain the motion of the Attorney General, and declare unconstitutional those portions of the 2004 Budget Bill that purport to a) transfer $13,700,100 from the KAPT reserve fund; b) prohibit the use of general fund or abandoned property funds for the KAPT program; and c) repeal KRS 393.15.

Respectfully submitted,

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